

8.1.3 Elements of an ADEA Claim — Harassment — Hostile Work Environment — Tangible Employment Action

Model

[Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this harassment was motivated by [plaintiff's] age.

[Employer] is liable for the actions of [names] in plaintiff's claim of harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

First: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to plaintiff's claim] by [names].

Second: [names] conduct was not welcomed by [plaintiff].

Third: [names] conduct was motivated by the fact that [plaintiff] is [age over 40].

Fourth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's] position would find [plaintiff's] work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of a reasonable person of [plaintiff's age]'s reaction to [plaintiff's] work environment.

Fifth: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of [names] conduct. And

Sixth: [Plaintiff] suffered an adverse “tangible employment action” as a result of the hostile work environment; a tangible employment action is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.

[For use when the alleged harassment is by non-supervisory employees:

Seventh: Management level employees knew, or should have known, of the abusive conduct. Management level employees should have known of the

1 abusive conduct if 1) an employee provided management level personnel
2 with enough information to raise a probability of age harassment in the
3 mind of a reasonable employer, or if 2) the harassment was so pervasive and
4 open that a reasonable employer would have had to be aware of it.]

5 6 **Comment**

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8 Courts have held that the ADEA prohibits harassment on the basis of age
9 (when the plaintiff is 40 years of age or older) though there is no Third Circuit
10 case law on the subject. *See, e.g., Montgomery v. John Deere & Co.*, 169 F.3d 556
11 (8th Cir. 1999) (asking an employee when he is going to retire can sometimes be so
12 unnecessary and excessive as to constitute evidence of discriminatory
13 harassment); *Peacock v. Northwestern Nat'l Ins. Group*, 156 F.3d 1231, 1234 (6th
14 Cir. 1998) ("In order to prove a prima facie case of a hostile work environment, a
15 plaintiff must show: 1) that the employee is 40 years or older; 2) the employee was
16 subjected to harassment either through words or actions, based on age; 3) the
17 harassment had the effect of unreasonably interfering with the employee's work
18 performance and creating an objectively intimidating, hostile or offensive work
19 environment ; and 4) the existence of some basis for liability on the part of the
20 employer."); *Burns v. AAF-McQuay, Inc.*, 166 F.3d 292 (4th Cir. 1999) (same
21 standard); *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244 (11th
22 Cir. 1997) (upholding a verdict on a claim of hostile work environment under the
23 ADEA).

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25 This instruction is substantively identical to Instruction 5.1.4, covering
26 hostile work environment claims with a tangible employment action under Title
27 VII. Like Title VII — and unlike Section 1981 — the ADEA regulates employers
28 only, and not individual employees. Therefore, the instruction is written in terms
29 of employer liability for the acts of its employees.

30
31 Respondeat superior liability for harassment by non-supervisory employees
32 exists only where "the defendant knew or should have known of the harassment
33 and failed to take prompt remedial action." *Andrews v. City of Philadelphia*, 895
34 F.2d 1469, 1486 (3d Cir. 1990).

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36 If the court wishes to provide a more detailed instruction on what
37 constitutes a hostile work environment, such an instruction is provided in 8.2.1.

38
39 It should be noted that constructive discharge is the adverse employment

1 action that is most common with claims of hostile work environment. Instruction
2 8.2.2. provides an instruction setting forth the relevant factors for a finding of
3 constructive discharge. That instruction can be used to amplify the term “adverse
4 employment action” in appropriate cases.

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6 The instruction’s definition of “tangible employment action” is taken from
7 *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

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9 These ADEA instructions on harassment do not include a pattern instruction
10 for quid pro quo claims. This is because quid pro quo claims are almost invariably
11 grounded in sex discrimination, and the ADEA applies to age discrimination only.
12 If an ADEA claim is ever raised on quid pro quo grounds, the court can modify
13 Instruction 5.1.3 for that occasion.

14 15 *Harassment as Retaliation for Protected Activity*

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17 In *Jensen v. Potter*, 435 F.3d 444, 446 (3d Cir. 2006), the court held that the
18 retaliation provision of Title VII “can be offended by harassment that is severe or
19 pervasive enough to create a hostile work environment.” The *Jensen* court also
20 declared that “our usual hostile work environment framework applies equally to
21 Jensen’s claim of retaliatory harassment.”

22
23 The Third Circuit has not considered whether a retaliation-by-harassment
24 claim is cognizable under the ADEA. It may be that such a claim exists under the
25 ADEA, because the standards for a retaliation claim are basically the same under
26 Title VII and the ADEA. *See* Lewis and Norman, *Employment Discrimination*
27 453 (2d ed. 2004) (“Section 623(d) of ADEA provides protection against
28 retaliation in the same terms as § 704(a) of Title VII.”). However, the *Jensen*
29 court, in finding a retaliation-by harassment claim, focused solely on the
30 retaliation provision of Title VII and did not consider the separate retaliation
31 provision of the ADEA. There is thus no direct authority for a retaliation-by-
32 harassment claim under the ADEA. But if the court finds that such a claim exists
33 under the ADEA, this instruction can be modified to accommodate the claim.
34 Bracketed language in Instruction 5.1.4 (Title VII) is provided for a retaliation-by-
35 harassment claim.

36
37 For further commentary on hostile work environment claims, see the
38 Comment to Instruction 5.1.4.